ASSOCIATION OF BANK OFFICERS, PENINSULAR MALAYSIA

v.

MALAYAN COMMERCIAL BANKS ASSOCIATION

HIGH COURT MALAYA, KUALA LUMPUR
EUSOFF CHIN J
[ORIGINATING MOTION NO. R8-32-135-88]
6 MAY 1991

STATUTORY INTERPRETATION: *Interpretation of award - President of earlier award no longer in Industrial Court - Specially constituted Court - Jurisdiction of Industrial Court - "Any trade dispute referred to or brought to the notice" - "Trade dispute" - "For the purpose" - "Court" - Industrial Relations Act 1967, ss. 22(1), (2), 33(1), (3), (5), 52(2).*

LABOUR LAW: *Industrial Court - Jurisdiction - Interpretation of award handed down by quorum no longer in Industrial Court - Specially constituted Court - "Any trade dispute referred to or brought to the notice of the Court" - "For the purpose" - "Court" - Industrial Relations Act 1967, ss. 22(1), (2), 33(1), (3), (5), 52(2).*

The applicant, ABO, had applied under s. 33(1) of the Industrial Relations Act 1967 (the Act) for the interpretation of Award No. 54/1981 (the 1981 award) and Article 31 (the said article) of a 1984 collective agreement to which both ABO and the respondent, MCBA, were parties. At the hearing of that application, Counsel for ABO queried whether the Industrial Court (IC) was specially constituted, as required by s. 33(5) of the Act, to hear the application as the 1981 award had been made by a quorum consisting of members who were no longer serving in the IC, Pursuant to Award No. 234/1988 (the 1988 award), ABO's application for interpretation was struck off.

In the 1988 award, the IC said that as it was impossible to convene the same quorum as the one in the 1981 award, the alternative is a Court specially constituted under s. 22. However, s. 22(1) deals with trade disputes and the other subsections make provision for substitution of panel members, except for the President which results in a situation whereby parties cannot apply for an interpretation of an award under s. 33, if the award was made by a President who was no longer the President.

The IC held that by virtue of s. 33(5), it could not interpret the 1981 award and that even if it could, the interpretation sought by ABO would be dismissed.

ABO then applied by way of originating motion for an order of *certiorari* to quash the 1988 award and an order of *mandamus* directing the IC to bear and determine ABO's application for interpretation according to law.

Held:

[1] The IC in the 1988 award had not answered directly the preliminary issue raised by ABO's Counsel on s. 33(5) as the bulk of the award dealt with the merits of the application.

[2] The IC had decided in the 1988 award that it had no jurisdiction to hear the application, and that no Court could be specifically constituted legally to hear the application. However, as the IC had also gone into the merits of the application, it had decided that even if it could hear the application, it would have dismissed it.

[3] The IC had no jurisdiction to hear the application for interpretation, but that part of the award stating that even if the IC had jurisdiction to hear the application, it would have dismissed it, is certainly premature and made without jurisdiction and must be quashed.

[4] Under s. 33(5), either the IC which handed down the award, or an IC specially constituted under s. 22 of the Act for the purpose of hearing the application for interpretation, has jurisdiction to entertain the application.

[5] The specially constituted Court mentioned in s. 33(5) must mean an IC constituted under s. 22(1) and the President and members of this specially constituted Court can consist of entirely new members other than those who delivered the award but the Minister must express clearly that the Court was constituted for the purpose of hearing a specific application made to it under s. 33(1). Section 22(2) does not arise at all except after the Court has been specially constituted.

[6] Reading s. 22(1) together with s. 33(5), it is evident that Courts may be constituted in accordance with the provision of s. 22(1) specially to deal with any application made under s. 33(1). The words "for the purpose" appearing at the end of the sentence in s. 33(5) must refer to the earlier expression "for the purpose of this section" which is "for the purpose of determining the application under s. 33(1) of the Act."

[7] Pursuant to s. 52(2), an application for interpretation of an award made under s. 33(1) is a matter referred to or brought to the notice of the IC. Therefore, s. 52(2) does widen the meaning of "any trade dispute referred to it" found in s. 22(1) to include "any matter referred to or brought to the notice of the Court under this Act".

[8] As s. 33(3) requires the IC to afford a reasonable opportunity of being heard to both the parties the IC had complied with this section as Counsel for the respondent had said that there was a brief submission and the affidavit of ABO's Secretary General also stated that there had been a brief submission made on that issue before the IC adjourned.

[Applicant's application granted; mandamus directing specially constituted Court of the IC to hear application under s. 33(5).]

Award referred to:
Association & Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1981]1 ILR 136 (Award 54/81)

Case referred to:
Si Rusa Inn Sdn. Bhd. v. National Union of Hotel Bar & Restaurant Workers [1982] CLJ (Rep) 750

Legislation referred to:
Industrial Relations Act 1967, ss. 22(1), (2), 33(1), (3), (5), 52(2)
Rules of High Court 1980, O. 53 r. 1

For the Applicant - B. Lobo; M/s. Lobo & Associates
For the Respondent - C.V. Das; M/s. Shook Lin & Bok

[**Editor's Note:**
The respondent has appealed to the Supreme Court.]

JUDGMENT

Eusoff Chin J:

The applicant had applied to the Industrial Court for an interpretation of Article 34 of the Industrial Court Award No. 54/1981 and Article 31 of a 1984 collective agreement to both of which award and agreement the applicant and the respondent were parties. The application was made under s. 33(1) of the Industrial Relations Act 1967 (the Act).

The Industrial Court fixed the application for hearing on 7 September 1988.

At the commencement of the hearing Encik B. Lobo, the learned Counsel for the applicant asked whether that Industrial Court was specially constituted to hear the application. He pointed out the provision of s. 33(5) of the Act. This is because the Award No. 54/1981 was made by quorum consisting of Harun J (as he then was) as the President and 3 other members all of whom were no longer serving in the Industrial Court. Section 33 of the Industrial Relations Act is quoted here for ease of reference, and it states:

> 33 (1) If any question arises as to the interpretation of any award or collective agreement taken cognizance of by the Court, the Minister may refer the question, or any party bound by the award of agreement may apply, to the Court for a decision on the question;
>
> (2) The Court may, upon the application of any party, by order vary any of the terms of an award, if it considers it desirable so to do for the purpose solely or removing ambiguity or uncertainty.
>
> (3) The parties bound by the award or agreement **shall be afforded** a reasonable opportunity of being heard.
>
> (4) The decision of the Court shall be binding in the same manner as the original award or agreement.
>
> (5) The expression "Court" for the purpose of this section, means the Court by **which the award was made** or any other Court **specially constituted under s. 22 for the purpose.**

It is alleged in the affidavit of the General Secretary of the applicant, that the Industrial Court did not hear a full submission on this issue but having heard briefly the submission of Encik Lobo, the Industrial Court adjourned the hearing. Half an hour after that the Industrial Court informed the applicant that the application for interpretation was 'struck-off' and that the written grounds would be supplied later.

On 15 September 1988, the applicant's solicitor received the written award of the Industrial Court. It is Award No. 234/1988 dated 9 September 1988.

Having obtained the necessary leave under O. 53 r. 1 of the Rules of the High Court 1980, the applicant filed this originating motion seeking an order of *certiorari* to bring forth and quash the Industrial Court Award No. 234/1988 dated 9 September 1988, and for an order of *mandamus* directing the Industrial Court to hear and determine the applicant's application for interpretation according to law.

The Industrial Court in its Award No. 234/1988 had not answered directly the preliminary issue raised by Encik Lobo, that is, whether the Industrial Court was a specially constituted Court under s. 33(5) of the Act to hear the application. The bulk of the award dealt with the merits of the application. This is what paras. 8 and 9 of the award stated:

> 8. The interpretation sought by the union against OCBC is brought under s. 33 of the Act and subsection (5) reads as follows:
>
> (5) The expression "Court" for the purpose of this section, means the Court by which the award was made or any other Court specially constituted under s. 22 for the purpose.
>
> Section 33(5) therefore requires the same quorum as the one which made Award No. 54 of 1981. It is now impossible to convene that quorum. The alternative is a Court specially constituted under s. 22 of the Act for the purpose.

Under s. 22, subsection (1) is for constitution of the Court to deal with a trade dispute (not for a case on interpretation). The other subsections make provision for substitution of panel members, but not of the President. This gives rise to the unusual interpretation that once a President of the Industrial Court has been changed, parties cannot apply for an interpretation under s. 33 of the Act, in respect of an award made by a quorum with the ex-President as the presiding officer.

9. By virtue of s. 33(5) of the Act, we are of the view that we cannot make an interpretation of Award No. 54 of 1981. Even if we can, we are of the view that we should dismiss the interpretation sought by the union.

I think what the Industrial Court meant (by para. 9 of the award) was that the Court was not a specially constituted Court as required by s. 33(5) of the Act, and that in view of the circumstances prevailing then, and of what the Industrial Court understood the provisions of s. 22 of the Act to mean, it was impossible to constitute a Court specially to hear the application for interpretation. In other words, the Industrial Court decided that it had no jurisdiction to hear the application, and that no Court could be specially constituted legally to hear the application. But, I believe, because the Industrial Court had also gone into the merits of the application, it decided that even if it could hear the application, it would have dismissed it.

Having perused the award and heard the submissions of Encik B. Lobo and Encik C.V. Das (Counsel for the respondent) I came to the conclusion that the Industrial Court had indeed no jurisdiction to hear the application for interpretation, but that part of the award stating that even if the Industrial Court had jurisdiction to hear the application, the Industrial Court would have dismissed it, is certainly premature and made without jurisdiction and must be quashed. I had also granted the order of *mandamus* directing the application before the Industrial Court to be heard by a specially constituted Court in accordance with the provisions of s. 33(5) of the Act. The respondent now appeals to the Supreme Court.

When applying for leave to appeal to the Supreme Court Encik C.V. Das had orally informed me that the respondent was interested in the interpretation of s. 33(5) of the Act as there appears to be a *lacuna* in the Act regarding a specially constituted Industrial Court.

It had not been disputed by both Encik B. Lobo and Encik C.V. Das that the Court which handed down the award must interpret the award on an application under s. 33(5) of the Act. The question is whether under s. 33(5) an Industrial Court can be specially constituted under s. 22 of the Act to hear an application under s. 33(1) of the Act.

Encik C.V. Das in support of the Industrial Court's interpretation of s. 33(5) and s. 22 of the Act stated that s. 22 cannot be applied for the purpose of determining an application for interpretation of an award made under s. 33(1) of the Act. Section 22 of the Act states:

22 (1) For the purpose of dealing with any trade dispute referred to it, the Court, except where otherwise provided by this Act, shall be constituted of the President and three members selected by the Minister, one from each of the panels specified in s. 21(1).

(2) If any member other than the President is unable to attend or continue to attend any proceedings of the Court or ceases to be a member, the Minister may select another member from the appropriate panel to fill the vacancy.

Encik C.V. Das submitted that s. 22 of the Act clearly dealt with "any trade dispute referred to" Industrial Court. An application for an interpretation of an award is not a 'trade dispute' as defined under the Act and that the trade dispute must be one "referred to the Industrial Court". He submitted further that under s. 22(2), the members only can be changed, but there is no provision for changing or substituting the President of the Court.

Encik B. Lobo submitted that s. 52(2) of the Act would apply. Section 52(2) states:

> The provisions of this Act relating to trade dispute other than the provisions relating to s. 26(2) and s. 30(4), shall apply to any matter referred to or brought to the notice of the Court under this Act.

Encik Das said s. 52(2) of the Act cannot apply as was so decided in the case *Si Rusa Inn Sdn. Bhd. v. National Union of Hotel Bar and Restaurant Workers* [1982] CLJ (Rep) 750.

I find that s. 33(5) of the Act is not ambiguous. Either the Industrial Court which handed down the award or an Industrial Court specially constituted under s. 22 of the Act for the purpose of hearing the application for interpretation, has jurisdiction to entertain the application.

The specially constituted Court mentioned in s. 33(5) must mean an Industrial Court constituted under s. 22(1) of the Act. It does not envisage that the President or a member of the Industrial Court which handed down the award which requires interpretation must be appointed or reappointed to the specially constituted Court. The President and members of this specially constituted Court can consist of entirely new people but, having regard to the words "specially constituted ... for the purpose", in s. 33(5) of the Act, the Minister must express clearly that the Court was constituted for the purpose of hearing a specific application made (or referred) to it under s. 33(1). The provision of s. 22(2) does not arise at all except after the Court has been specially constituted.

As regards the contention that a Court constituted under s. 22(1) of the Act has jurisdiction to deal only with any trade dispute referred to it, it would appear to be so if this section is read in isolation. But reading s. 33(5) of the Act, it is evident that Courts may be constituted in accordance with the provision of s. 22(1) of the Act specially to deal with any application made under s. 33(1) of the Act. The words "for the purpose" appearing at the end of the sentence in s. 33(5) of the Act must refer to the earlier expression "for the purpose of this section" which is "for the purpose of determining the application under s. 33(1) of the Act."

In *Si Rusa Inn Sdn. Bhd. v. National Union of Hotel Bar and Restaurant Workers* [1982] CLJ (Rep) 750, the issue was whether s. 52(2) of the Act widens the meaning of 'award' in s. 33A of the Act. Hashim Yeop A. Sani J (as he then was) held that since s. 33A has restricted the word 'award to' "an award under s. 30(1)" of the Act, s. 52(2) of the Act does not extend the word 'award' to an order made under s. 56 of the Act for non-compliance with a certain article in a collective agreement. That decision cannot be applied here as s. 22 of the Act was not the subject matter for interpretation, nor was it argued there.

Section 52(2) of the Act states that the provisions of the Act relating to trade dispute shall apply to any matter **referred to** or **brought to the notice** of the Industrial Court under the Act. An application for interpretation of an award made under s. 33(1) of the Act is a matter referred to or brought to the notice of the Industrial Court under the Act.

Therefore, s. 52(2) of the Act does, in this case, widen the meaning of "any trade dispute referred to it" found in s. 22(1) to include "any matter referred to or brought to the notice of the Court under this Act". But as I have reasoned earlier, by s. 33(5), the intention of Parliament is clear in that where the original Court which handed down the award can no longer be constituted for whatever reason, the application for an interpretation of an award made under s. 33(1) of the Act has to be heard by an Industrial Court specially constituted under s. 22(1) of the Act. What it means is that the manner or method of constituting the special Court is the same as that provided by s. 22 for constituting a Court to deal with any trade dispute referred to it.

As regards the argument by Encik B. Lobo that he was not given the opportunity under s. 33(3) of the Act to fully argue the issue on whether the Industrial Court was a specially constituted Court which touches on the jurisdiction of the Court to hear the application, I note that the affidavit of the General Secretary of the applicant had stated that he was present at the hearing and that there was a brief submission made on that issue before the Industrial Court adjourned for about a half hour followed by the striking out of the application. The notes of the proceedings before the Industrial Court are not placed before me, and I do not know what was said in the brief submission and whether or not the Industrial Court heard the learned Counsels for both parties before adjourning the sitting. But s. 33(3) of the Act requires the Industrial Court to afford a reasonable opportunity of being heard to both the parties, and where such opportunity is not afforded to the parties, the award must be quashed because the Industrial Court would have acted arbitrarily in coming to its decision. Encik Das said there was a brief submission, and I take it that the Industrial Court had complied with the provision of this section.

Since I have issued the order of *certiorari* to quash part of the award only, I made no order as to costs.

Also found at [1991] 2 CLJ 1351